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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-800

JUDITH EVA HERSKOWITZ,

Petitioner,

vs.

BERNARD J. HERSKOWITZ,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS, THIRD DISTRICT STATE OF FLORIDA

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS, THIRD DISTRICT STATE OF FLORIDA

Petitioner prays that a Writ of Certiorari issue to review the judgment and decision of the District Court of Appeal of Florida, Third District, entered on the 21st day of August, 1973, in the above case.

OPINION BELOW

The opinion of the District Court of Appeal, Third District of Florida, is reported in 281 So.2d 595. Copy of said opinion is attached hereto in the Appendix to this Petition.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3) and Rule 19 of the Supreme Court Rules in that in the courts below Petitioner specially set up or claimed title to the property and rights, privileges and immunities under the Constitution of the United States and the state courts below decided a federal question of substance not theretofore determined by this Court or decided it in a way probably not in accord with applicable decisions of this Court.

QUESTIONS PRESENTED

In 1956, while the parties were residents of the State of New York, Petitioner and Respondent, who were husband and wife, entered into a contract by which the wife conveyed her interest in the business to the husband and herself as joint owners, and the parties agreed that all their assets would be jointly owned from that day on. In 1967 the wife began litigation in the Supreme Court, County of Bronx, New York, seeking an accounting and other relief. During the pendancy of that litigation the husband brought this suit for divorce in 1970. The Florida court ignored the efforts of the New York court to obtain an accounting from the husband and ignored evidence indicating that the husband owned cash, stocks and mortgages in the neighborhood of $300,000, as well as extensive real estate holdings, and entered a Final Judgment of Divorce awarding the wife "special equities" amounting to $26,500, which was increased on Petition For Rehearing to $46,500. The court also

directed the wife to dismiss all litigation in New York concerning the enforcement of the agreement between the husband and wife.

The questions presented to this Court are:

1. Did the Florida court deprive the wife of her property without due process of law in violation of Section I, Amendment 14, United States Constitution, when it:

(a) Ignored the contract of joint ownership and awarded the wife only $46,500 out of more than $300,000 in assets? Or,

(b) Ordered the wife to dismiss her New York suit to enforce the contract?

2. Did the Florida court fail to give full faith and credit to New York laws in violation of Article 4, Section I, United States Constitution, when it failed to enforce a contract made in New York and valid under the laws of that state?

3. Did the Florida courts fail to give Petitioner the equal protection of its laws by failing to enforce the post nuptial agreement for her, when such post nuptial agreements have been enforced in favor of husbands?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent portions of the Constitutional provisions and Statutes involved are as follows:

Section I, Amendment 14, United States Constitution:

"No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of its laws."

Section I, Article 4, United States Constitution:

"Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State."

Section 3-301, McKinney's New York General Obligations Law:

"A married woman has all the rights in respect to property, real or personal, and the acquisition, use, enjoyment and disposition thereof, and to make contracts in respect thereto with any person including her husband, and to carry on any business."

STATEMENT OF THE FACTS

The parties were married in New York on January 10, 1956. At that time the husband had about $2,000 or $3,000 in savings and worked for his father at a salary of $75 or $80 per week. The wife was a one-third owner of a family business having a value in excess of $100,000. She worked for the business and was drawing a salary of $125 per week. After the marriage, both parties continued to work for the business and drew a joint salary in the amount of $250 per week plus certain expenses.

On August 15, 1956, the parties entered into an agreement in which the wife agreed to give all of her interest in the family business to the joint ownership of both parties, and both parties agreed that they would grant the other party one-half ownership of all "assets, income, profits, wages, earnings, investments and properties" except inheritances, which each then presently owned or might acquire thereafter until the agreement was

"dissolved by the written signed agreement of both parties. Upon such a dissolution by agreement, all assets that the said parties shall have, shall be equally divided between them."

The wife performed the agreement by conveying to the husband the promised interest in the family business.

The parties resided together in New York until early in 1966, at which time they separated. Prior to the separation, the husband had taken control of the business and, both before and after the separation, accumulated assets which at the time of the divorce hearing totalled several hundred thousand dollars. At no time did the parties terminate the agreement by a subsequent agreement in writing.

As stated by the court below, "the record indicates that the appellee made a conscious effort to conceal his assets from his wife." In 1966, the wife brought suit in the Family Court of the State of New York for support for herself and the two minor children of the parties. In 1967, she began litigation in the Supreme Court, County of Bronx, New York, seeking to enforce the contract and to obtain an accounting from the husband. While this litigation was pending the husband, in 1969, moved to Florida and on May 5, 1970 filed a Complaint For Divorce in the case at bar in Dade County, Florida. The wife answered and filed a counterclaim. After extensive testimony and hearings a Final Judgment was entered on May 19, 1971, granting a divorce and awarding the wife the sum of $26,500 as "a special equity in the assets of" the husband, to be paid over a five-year period. The wife filed a Petition For Rehearing which was granted on the sole issue of the wife's "special equitable and legal interests in the assets of" the husband. Prior to the final rehearing, extensive discovery was attempted which indicated that the husband's assets probably amounted to around $300,000.

Thereafter, the court entered its Final Judgment Upon Rehearing, which increased the wife's "equity in the assets and accumulated earnings" of the husband to $46,500, payable in four installments. The court also ordered the wife "to dismiss all legal action pending against (the husband) pertaining to his assets."

The wife took an appeal to The Court of Appeals, Third District of Florida, which affirmed the trial court.

REASONS FOR GRANTING THE WRIT

The parties entered into an agreement whereby each was to become owner of one-half of the assets of the other. This agreement was lawful in New York at the time it was made (McKinney's New York General Obligations Law, Section 3-301), and was lawful in Florida at the time of the divorce proceedings. (See Florida Constitution, 1968, Article Ten, Section Five; Florida Statutes, Section 708.09,708.10). The evidence showed that the husband had sold the business originally conveyed to him by the wife for $112,000; owned one-half of a mortgage in the amount of $175,000; owned twenty-five percent of 116 acres in Hope, New Jersey; was one-third owner of a farm, and owned one-half interest in two closely held corporations worth in excess of $100,000. In addition, he had other assets not specifically valued in this case. The total of these assets is in the neighborhood of $300,000, and one-half of this amount would be approximately $150,000. The court below originally gave the wife only $26,500 and later increased it to $46,500.

By failing to give the wife one-half of the total amount owned by the husband, either in kind or in cash, the court has deprived the wife of her property and has given it to the husband. The court failed to state any rule of law authorizing such a taking of property.

This constitutes state action depriving a person of property without due process of law. Although there is no case from this Court on point, a similar case arose in **Cooke v. Cooke**, 1944, 150 P. 2d 514, 65 Cal. App. 2d. 260, where the husband had made a gift of a life insurance policy to his wife and, after divorce, attempted to obtain a restoration of the policy. The California court held that this would have the effect of depriving the wife of her property without due process of law.

Furthermore, by failing to enforce the contract, the court has ignored the laws of the State of New York which authorized the making of such a contract between a husband and a wife.

While there is no case of this Court on point, it has been held that a post nuptial agreement which was valid when entered into and approved by a court of competent jurisdiction is required to be given full faith and credit in a sister state (**Wallihan v. Hughes**, 1954, 82 SE 2d. 553, 196 Va. 117). In that case the contract was contrary to Virginia public policy, but Virginia was required to enforce it nevertheless. **A fortiori**, the contract should have been enforced in the case at bar since it was not contrary to Florida public policy.

Finally, Florida's courts have consistently upheld post nuptial agreements, particularly where they favor the claims of the husband against the wife. See **Clark v. Clark**, 76 So. 2d 426. By failing to enforce this agreement, the courts below failed to give Petitioner the equal protection of the laws, in violation of Section I, Amendment 14 to the United States Constitution.

The courts below were therefore in error in failing to give the wife a one-half interest in and to all of the property of the husband, and further erred in restraining her from seeking full and complete accounting from the husband and full and complete performance of the contract through the courts in New York.

CONCLUSION

The courts below have deprived Petitioner of the bulk of her interest in the husband's property by failing to enforce the New York contract by which she was given this property. She has, therefore, been deprived of her property without due process of law, contrary to Amendment 14, Section I, United States Constitution. Furthermore, the act of the court in failing to enforce the New York contract, which was lawful when and where made, constitutes a failure to give full faith and credit to the laws of New York State making this contract lawful when and where executed, contrary to Article Four, Section I, United States Constitution. Finally, by failing to enforce this agreement in favor of the wife, while enforcing similar agreements in favor of the husband, the Florida courts failed to give Petitioner

the equal protection of the laws, in violation of Section I, Amendment 14 to the United States Constitution. This Court should, therefore, issue a Writ of Certiorari to the courts below and issue its Mandate, directing that so much of the Final Judgment of Divorce as purports to divide the property of the parties and to restrain the wife from enforcing the property agreement be set aside, subject to further proceedings in the appropriate forum.

RESPECTFULLY SUBMITTED

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APPENDIX

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT JULY TERM, A.D. 1973
CASE No. 72–1396

Opinion filed August 21, 1973.

(BALANCE OF CAPTION OMITTED)

PER CURIAM.

The appellant is the former wife of the appellee. She appeals a final judgment of divorce by presenting and arguing some twenty-one points on appeal. We affirm upon a holding that all of the matters presented fall within two categories; they are either procedural errors which were induced by the appellant's own actions or they relate to findings which are supported by evidence before the trial judge and are within the range of his judicial discretion. For obvious reasons we will not attempt to discuss each point separately. However, we will briefly state the origin of the problems involved and the basic principles supporting the trial judge's disposition of the issues presented.

The parties were married in New York in 1956. A few months after the marriage, the husband and wife entered into a contract by which the wife conveyed her interest in a business to her husband and herself as joint owners, and the parties agreed that all their assets would be jointly owned from that day on. The husband and the business prospered but the marriage did not. After the business in which the parties owned a joint interest was sold in 1965, and after the appellee husband began to variously invest the monies he received, the Family Court of the State of New York entered an order in 1966 providing for the support of the appellant and her two minor children. The record indicates that the appellee made a conscious effort to conceal his assets from his wife. In 1967, the appellant wife began litigation in the Supreme Court, County of Bronx, New York, seeking an accounting and other relief against the appellee, his father and two brothers. She sought enforcement of her rights of joint ownership as set out in the contract of 1956.

The appellee husband brought the instant action for divorce in 1970. The appellant answered, filed a counterclaim, and attached the 1956 agreement. After extensive testimony and hearings a final judgment was entered on May 19, 1971. This judgment awarded the appellant the amount of $26,500.00 as "a special equity in the assets of the Plaintiff". The court ordered the amount paid "in equal annual payments over a five (5) year period commencing (30) days from [the] date of this Order". The appellant filed her motion for new trial and petition for rehearing. In the petition, she urged that the court had not properly considered the income and assets of the plaintiff and the written agreement pertaining thereto for joint ownership of assets. The trial judge granted appellant's motion for new trial on September 7, 1971, on the sole issue "of the Defendant, Judith Herskowitz' special equitable and legal interest in the assets of the Plaintiff, Bernard J. Herskowitz". Prior to the final rehearing, the court entered orders permitting the appellant to take extensive depositions. Thereafter, the court entered its final judgment on rehearing. This judgment reaffirmed the prior judgment except as to provisions regarding appellant's interest in her husband's assets. As to these assets, the court found:

* * * * * * * * * * *

"(1) The Court finds from all of the testimony and voluminous exhibits in evidence that the Defendant, based on special equities, and the aforesaid postnuptial agreement, has an equity in the assets and the accumulated earnings, wages and profits of the Plaintiff in the amount of $46,500.00, which is hereby ordered to be paid by the Plaintiff to the Defendant as follows:

(a) Ten thousand dollars within thirty (30) days from the date hereof, and

(b) The balance in three (3) equal installments beginning thirteen (13) months from and after the date hereof."

* * * * * * * * * * *

In addition, the court made the following order relative to other litigation pending between the parties:

* * * * * * * * * * * *

"(2) The Defendant, JUDITH HERSKOWITZ, be and she is hereby required to dismiss all litigation pending against the Plaintiff pertaining to his assets and all causes of action arising therefrom, including assessment of damages for alleged concealment thereof now pending against him."

* * * * * * * * * * * *

[1,2] On this appeal, one of appellant's principal contentions is that the court had no jurisdiction to determine the rights of the parties to the contract made between the parties in 1956. We think that this position is untenable in view of the fact that the appellant herself introduced the contract into the litigation and petitioned for and received an extensive rehearing based upon the application of that contract to the assets of the appellee. The court did not err in pursuing the matter at the appellant's request inasmuch as it is well established that upon a termination of marriage by a divorce of dissolution, the trial judge should insofar as possible settle all outstanding property rights between the parties. See Finston v. Finston, 160 Fla. 935, 37 So.2d 423 (1948); Dotter v. Dotter, Fla. App. 1962, 147 So. 2d 209.

[3,4] Appellant's contention that the court erred in enjoining her from further prosecution of additional court proceedings to enforce the same rights which she has litigated in this cause is without legal basis. In order to insure the efficacy of judgments in dissolution of marriage cases, the courts have frequently wielded their power of injunction. See cases collected at 10A Fla. Jur. Dissolution of Marriage, Separation, and Annulment, 167, et seq. The power may be used to prevent harassment after final judgment. See Bazzano v. Bazzano, Fla. App. 1965, 175 So. 2nd 801. Therefore, the order is proper under the circumstances of this case.

[5] The Appellant has also urged reversal of the finding concerning the extent of appellant's interest in the appellee's property. An examination of the lengthy record convinces us that the finding is based upon conflicting evidence and that we

may not substitute our view for that of the trial judge. See Hobbs v. Hobbs, Fla. App. 1962, 136 So. 2d 363.

Appellant has pointed out that the trial court's order directing the payment of the sum of $46,500.00 in three equal installments fails to specify at what intervals of time these installments must be paid. In view of the fact that the trial court reaffirmed the provisions of its prior judgment except as changed in the final judgment upon rehearing, we conclude that the provision objected to should be amended by providing that the sum of $46,500.00 is to be paid as follows: (a) $10,000.00 immediately upon remand of this cause; and, (b) the balance in three equal installments, the first installment to be paid on or before the 12th day of July, 1974, a like installment to be paid on or before the 12th day of July, 1975, and a like installment to be paid on or before the 12th day of July, 1976.

We have considered the other points raised on appeal and find that they do not present reversible error.

The judgment appealed is amended as to the installment payments as above set out and as amended is affirmed.

Affirmed.

SUPREME COURT, U. S.

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1973

CASE NO. 73-800

JUDITH EVA HERSKOWITZ,
Petitioner,

vs.

BERNARD J. HERSKOWITZ,
Respondent.

On Petition for Writ of Certiorari to the District Court of Appeal of Florida, Third District

BRIEF FOR RESPONDENT IN OPPOSITION

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In the Supreme Court of the United States

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On Petition for Writ of Certiorari to the District Court of Appeal of Florida, Third District

---

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The Circuit Court of Dade County, Florida, entered a Final Judgment of Divorce on May 19, 1971. This decision is unreported and is set forth at page A. 1 in the Appendix to this response. A Motion for New Trial and Petition for Re-Hearing was filed and granted by Order of the Circuit Court dated September 7, 1971 (A. 8). On June 12, 1972, the Circuit Court entered its Final Judgment Upon Re-Hearing, unreported, and set forth at A. 9 in the Appendix to this Petition. The Petitioner then filed a Motion for Re-Hearing and an Amendment to Motion for Re-Hearing, both of which were denied by Order of the Circuit Court on October 27, 1972 (A. 19). On appeal to the District Court of Appeal of Florida, Third District, the aforesaid Final Judgments of Divorce were affirmed except for the *method of payment* of the Wife's share in the Husband's property. The Petitioner then filed a suggestion to "have question certified to the Supreme Court of Florida as one of great public interest", but the District Court declined to do so, and the mandate issued.

JURISDICTION

The Petitioner purports to invoke jurisdiction pursuant to the provisions of 28 U.S. Code 1257(3), and Rule 19 of the Rules of the Supreme Court of the United States. Respondent asserts the complete absence of jurisdiction in this Court in that no State court has decided any federal question, whether it be of substance or otherwise; nor has any federal issue, of substance or otherwise, even been presented to the courts below with the infinitesimal exceptions we now set forth.

This is a matrimonial matter. A brief marriage was terminated by separation in 1966; closely followed by seven years of litigation by the rejected Wife. In none of this litigation has the Petitioner raised any federal questions, except as will be noted:

(a) On May 19, 1971, the Circuit Court of Dade County, Florida, entered a Final Judgment of Divorce in favor of the Respondent; awarding $26,500 to the Wife by reason of her post-nuptial agreement pertaining to, and her accumulated equities in, the Husband's property. It also awarded a divorce and, among other odds and ends of alimony, child custody, and protective orders, stated at paragraph 8:

> The Court does hereby enter a Permanent Order of Protection as follows:
>
> [a] Plaintiff shall not annoy, molest, thereafter or assault Defendant.
>
> [b] Defendant shall not annoy, molest, thereafter or assault Plaintiff. She is not to follow him or have him followed. She is to refrain from making phone calls or going to his home or place of business, and she is not to make phone calls to any member of his family except in case of an emergency involving one of the children.
>
> [c] The parties shall not contact business or social acquaintances of each other, and they shall not interfere with letters to and from the children.

(b) On May 28, 1971, the Wife, being dissatisfied with her award, filed a "Motion for New Trial and Petition for Re-Hearing" (A. 5). The only mention of alleged deprivation of rights guaranteed by the United States Constitution is directed to the above-described Paragraph 8, and reads as follows:

> That the Court erred in its ruling under paragraph eight (8) of said judgment in that said paragraph, in particular sub-paragraphs (b) and (c) unquestionably violate the Defendant's *freedom of speech and movement* which is guaranteed by the Florida Constitution and the United States Constitution, and amendments pertaining thereto. (Rule 1.530)

(c) The Petition for Re-Hearing was granted on September 7, 1971 (A. 8), not for constitutional reasons, but to review claims of fraud relative to "special equitable and legal interests in the assets of the Plaintiff."

(d) On June 12, 1972, the Circuit Court entered Final Judgment Upon Re-Hearing. The Court made no ruling with regard to any constitutional issues. The Court did increase the Wife's award from $26,500 to $46,500, stating:

> All the financial matters between the parties and pertaining to their property interests, from the inception of the marriage to the date of this Judgment have been reviewed and this special equity award is a final determination. In reaching this determination the Court took into consideration not only the post-nuptial agreement between the

> parties, but also any special equitable interests the Wife may have in the assets of the Husband; moreover, the Court took into consideration all of the Defendant's claim of concealment and secreting of assets by the Plaintiff in the names of his father, Joseph Herskowitz, and his brother, Marvin Herskowitz. It is the intention of this Court to fully and finally lay at rest the litigation between these parties as pertains to their assets from the date of the inception of the marriage to and including the present time.

(e) On June 22, 1972, the Petitioner again moved for a re-hearing, and although the most recent judgment did not deal with the problem, the Petitioner again asserted a violation of the First Amendment as follows:

> The Court erred in its ruling under Paragraph Eight (8) of said Final Judgment in that said Paragraph, in particular, sub-paragraphs (b) and (c) unquestionably violate Defendant's freedom of speech and movement which is guaranteed by the Florida Constitution and United States Constitution, and amendments pertaining thereto. (Rule 1.530)

The Circuit Court entered its Order Denying Petition for Re-Hearing on October 27, 1972.

(f) Thereafter, the Petitioner filed her appeal to the District Court of Appeal of Florida, Third District, setting forth eight assignments of error, including twenty-two sub-assignments of error (A. 20). These alleged in voluminous detail the inadequacy of the Wife's awards

and numerous errors in the Court's handling of the trial. There is not a single assertion of error based upon deprivation of constitutionally guaranteed rights.

(g) In its Opinion of August 21, 1973, the District Court of Appeal of Florida, Third District, affirmed the Judgment below in all respects (except as to the manner in which the Husband was to make the annual payments of $46,500). The District Court of Appeal never mentioned the Constitution of the United States—nor any violation of rights guaranteed thereunder.

(h) On September 5, 1973, and pursuant to Florida Appellate Rule 4.6, the Petitioner asked the District Court of Appeal to certify the following non-Federal question to the Supreme Court of Florida as being of great public interest:

> In adjudicating the property rights of the parties in an action for dissolution of marriage, may the trial court bar one of the parties from enforcing the terms of a contract between the parties calling for joint ownership of all assets, and over objection make a consolidated "special equity" award which indistinguishably merges therein both special equities and contract rights? A. 33)

Petitioner gave four reasons why the District Court of Appeal should exercise its discretion, including the following:

> At issue also is the basic constitutional question of whether in a dissolution of marriage case, non-

enforcement of contract rights of a party constitutes a deprivation of property without due process of law, in violation of Article 1, Sec. 9 of the Florida Constitution 1968 Revision, and of the 14th Amendment to the United States Constitution. (Also see Art. 1, Sec. 10).

Also, inherently at issue is the question of whether the Court's merging of contract rights into special equities deprives a party of property without due process of law, since it changes the remedy and permits the Court to order installment payments of the special equity and thereby deprives a party of the valuable right to have a *judgment* which can be immediately executed. A. 34)

(i) The District Court of Appeal declined to certify the question as being of any importance. Its mandate issued.

* * *

This petition for Writ of Certiorari then followed.

The questions presented to the Supreme Court of the United States suggest that the Petitioner has been deprived of her property without due process of law in violation of the Fourteenth Amendment; and makes the further suggestion that the Florida courts failed to award full faith and credit "to New York laws" in violation of the United States Constitution.

These questions are unsubstantial in the extreme; nor have they ever been presented to any court in Florida for consideration or determination.

QUESTION PRESENTED

WHETHER VAGUE ALLEGATIONS OF CONSTITUTIONAL DEPRIVATIONS BY AN EX-WIFE, DISSATISFIED WITH HER AWARD IN A FINAL JUDGMENT OF DIVORCE, AND NEVER PREVIOUSLY PRESENTED TO THE STATE COURTS, FORM ANY BASIS FOR JURISDICTION IN THIS COURT TO GRANT THE PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF THE FACTS

We have read the Statement of the Facts and reasons for granting the writ as set forth in the Petition for Writ of Certiorari. It is, unfortunately, a mishmash of untruths, half-truths, and downright misrepresentations of the record below. (It is inconceivable, for example, that the record would support the claim that "extensive discovery was attempted, which indicated that the Husband's assets probably amounted to around $300,000".) Both parties are agreed, however, on the proposition that the Respondent-Husband became obliged to disgorge $46,500 in favor of his former Wife, a result reached after the Court "took into consideration not only the post-nuptial agreement between the parties, but also any special equitable interests the Wife may have in the assets of the Husband." (A. 15) On appeal, the District Court of Appeal of Florida, Third District, affirmed, because all alleged errors

> "are either procedural errors which were induced by the Appellant's own actions, or they relate to findings which are supported by the evidence

> before the trial judge, and are within the range of his judicial discretion. . . The Appellant has also urged reversal of the finding concerning the extent of the Appellant's interest in the Appellee's property. An examination of the lengthy record convinces us that the finding is based upon conflicting evidence and that we may not substitute our view for that of the trial judge." (A. 27)

Neither did the District Court of Appeal of Florida, Third District, mention the Constitution of the United States nor any claim of deprivation of rights guaranteed thereunder. No such claim of constitutional deprivation had been presented.

When the appellate court issued its mandate, it negated the suggestion for certification of question under Florida Appellate Rule 4.6. Thus the "constitutional issues" set forth in Paragraphs (c) and (d) of that suggestion *have never been timely brought to the attention of any of the Florida courts; nor have they been ruled upon by said courts.*

ARGUMENT

The decision below is eminently correct and even had substantial federal issues been raised below, or ruled upon, the results based (as the court below noted) on the preponderance of conflicting evidence do not suggest any need for review.

In constitutional terms, this is a simple matrimonial case. It does not involve issues of in personam service of

process, or full faith and credit of another state's decrees, or the reach of the long-arm statutes, or freedom of entry to the courts. Reduced to a nutshell, this Wife remains dissatisfied with her share of the marital trove. Seven years of litigation have failed to dampen her enthusiasm for justice, i.e., more money for herself. The first Judgment of Divorce netted her $26,500. She rejected it, and on re-hearing advanced her cause by an additional $20,000. She rejects this as well, but now, for the first time, she asserts that the distance between her yearnings and reality is actually a violation of due process of law. It is as if the Constitution guaranteed her fantasies, and the courts' failure to incorporate them into a decree violates the Fourteenth Amendment.

There are no discernible federal issues of substance, or at all, in the decision below. Neither the trial nor appellate courts ever mentioned any constitutional matter. No constitutional issue was ever raised, or argued by the parties to any court below (First[!] Amendment exceptions are noted above; as also the belated effort to raise a constitutional banner after the case was lost.)

This Court has no jurisdiction to grant a Petition for Writ of Certiorari unless substantial federal questions were previously raised or ruled upon below. The federal questions must be raised in the court below. *Hill v. California*, 401 US 797, 28 L.Ed.2d 484, 91 S.Ct. 1106; *Monks v. New Jersey*, 398 US 71, 26 L.Ed.2d 54, 90 S.Ct. 1563; *Street v. New York*, 394 US 576, 22 L.Ed.2d 572, 89 S.Ct. 1354; *Pickering v. Board of Education*, 391 US 563, 20 L.Ed.2d 811, 88 S.Ct. 1731; *Cardinale v. Louisiana*, 394 US 437, 22 L.Ed.2d 398, 89 S.Ct. 1162.

There are preciously few cases involving matrimonial matters that have ever been decided by the Supreme Court. (The Petitioner cited none). Such few cases as do appear decide federal questions that are only incidentally involved in matters of marriage and divorce — such as full faith and credit, service of process and jurisdiction in the courts. See *Boddie v. Connecticut*, 401 US 371, 28 L.Ed.2d 113, 91 S.Ct. 780; *May v. Anderson*, 345 US 528, 97 L.Ed. 1221, 73 S.Ct. 840; *Halvey v. Halvey*, 330 US 610, 91 L.Ed 1133, 67 S.Ct. 903; and *Williams v. North Carolina*, 317 US 287, 87 L.Ed. 279, 63 S.Ct. 207.

Here the courts below had jurisdiction over the parties and the subject matter. The only problem that exists is the visceral reaction of an angry woman to a delusion that the award of the courts below is inadequate. Should this ever become a basis for federal jurisdiction, the entire Bar will unanimously support Professor Freund's suggestion for a penultimate "Supreme" Court.

CONCLUSION

The decision should be affirmed; the Petition for Writ of Certiorari denied.

Respectfully submitted

TOBIAS SIMON

TOBIAS SIMON &
ELIZABETH duFRESNE
1492 South Miami Avenue
Miami, Florida 33130

CERTIFICATE OF SERVICE

I, TOBIAS SIMON, a member of the Bar of the Supreme Court of the United States, do hereby certify that a true and correct copy of this Brief for Respondent in Opposition was mailed this 14th day of December, 1973, to ROBERT M. BRAKE and DAVID BOLTON, Attorneys of Appellant, 1830 Ponce de Leon Boulevard, Coral Gables, Florida, 33134.

TOBIAS SIMON

APPENDIX

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

CASE NO. 70-8058 (FALK)

BERNARD J. HERSKOWITZ,

Plaintiff,

vs.

JUDITH HERSKOWITZ,

Defendant.

FINAL JUDGMENT

(May 19, 1971)

THIS CAUSE coming on for Final Hearing, before me, one of the Judges of the above-styled Court, upon Plaintiff's Complaint and Defendant's Answer, incorporating Counterclaim, and having heard testimony from the parties and their respective witnesses, and having reviewed the voluminous exhibits, some of which were admitted in evidence and some of which were proferred, and having heard oral argument of counsels, it is thereupon:

ADJUDGED AND ORDERED:

1. That this Court has jurisdiction of the parties and the subject matter.

2. That the Plaintiff has proven the allegations of his complaint concerning residency, and the Court finds

that he is a Florida resident having resided in Miami Beach, Florida, for more than six (6) months prior to the institution of this action.

3. That Plaintiff has proven the allegations of his complaint concerning grounds for divorce and the Defendant is guilty of Extreme Cruelty, whereupon this Court enters a divorce a vinculo matrimonii.

4. That Defendant's counterclaim and all of her testimony and her parents' testimony, and evidence concerning same, has been heard and reviewed at length in arriving at the following financial decisions.

5. That custody of the minor children of the parties is not ruled upon by this Court as the Court feels that it does not have jurisdiction of the children for custody purposes, as said children reside in the State of New York and were not present in the Florida Court.

6. That this Court grants full faith and credit to the New York visitation Orders, as follows:

The Plaintiff may pick up the children at Defendant's residence on the second Friday of each month at 3:00 p.m., and return them to the Defendant's residence on Sunday at 8:30 p.m.

The Defendant shall have both children ready for the visitation. The Defendant shall be at her residence by 8:30 p.m., Sunday, to receive them on their return. If Plaintiff notifies Defendant by Wednesday evening by telegram or certified mail (if received by her not later than Thursday) he shall have visitation on Sundays (in

addition to the above weekend), from 1:00 p.m., to 7:00 p.m. Plaintiff shall have visitation on Purim night, the first two days of Passover, both days of Rosh Hashonah, and first two days of Soccoth; also two weeks during July or August to coincide with Plaintiff's vacation on at least one month written notice by certified mail to Defendant, and Plaintiff is to pay all travel expenses, and there shall be no support reduction during said vacation periods. Plaintiff may take the children to Florida during his visitation or arrange for them to be brought to Florida. Plaintiff may telephone every Wednesday at 7:00 p.m., and both children shall be available at Defendant's residence for the telephone call. Defendant must notify Plaintiff immediately as to the telephone number where both children can be reached, and if the number changes, he must be notified at once of the new number.

Defendant shall always inform Plaintiff as to where both children reside at all times.

The children shall continue to attend the nearest Orthodox Jewish Parochial school, provided Plaintiff pays for same.

7. Child Support is hereby fixed pursuant to stipulation of the parties and previous New York Court Orders at $50.00 per week per child, and Plaintiff may take the children as dependents for tax purposes.

Periodic Alimony is hereby fixed pursuant to stipulation of the parties and previous New York Court Orders at $50.00 per week, and the Defendant shall be entitled to claim tax benefits, as head of her household.

8. The Court does hereby enter a Permanent Order of Protection as follows:

(a) Plaintiff shall not annoy, molest, thereafter or assault Defendant.

(b) Defendant shall not annoy, molest, thereafter or assault Plaintiff. She is not to follow him or have him followed. She is to refrain from making phone calls or going to his home or place of business, and she is not to make phone calls to any member of his family except in case of an emergency involving one of the children.

(c) The parties shall not contact business or social acquaintances of each other, and they shall not interfere with letters to and from the children.

9. The Court finds from all of the testimony and voluminous exhibits proferred that the Defendant has a special equity in the assets of the Plaintiff in the amount of $26,500.00, which is hereby ordered to be paid by the Plaintiff to the Defendant in equal annual payments over a five (5) year period commencing thirty (30) days from date of this Order. All the financial matters of the parties from the inception of the marriage to date have been reviewed and this special equity award is a final determination. The alleged contract between the parties dated August 15, 1956, formed one of the bases for this award and all pending litigation concerning same shall be dismissed.

10. Defendant's counsel is hereby awarded an additional reasonable fee in the amount of $2,500.00, payable within ninety (90) days from the date of this Judgment, plus Court costs and expenses in the amount of $251.70. This amount for costs being stipulated by counsel.

11. The Court retains jurisdiction over the parties to enforce each and every provision of this Final Judgment.

DONE AND ORDERED in Chambers at Miami, Dade County, Florida, this 19 day of May, 1971.

Jack A. Falk

CIRCUIT JUDGE

[TITLE OMITTED]

MOTION FOR NEW TRIAL AND PETITION FOR RE-HEARING

COMES NOW the Defendant, JUDITH HERSKOWITZ, by and through her undersigned attorney, and herewith files this Motion for New Trial and Petition for Re-Hearing, pursuant to Florida Rules of Civil Procedure, Rule 1.540(b) and Rule 1.530, and as grounds therefor would state the following:

1. That the judgment entered by this Court on May 19, 1971, and filed among the records of the Circuit Court is contrary to the manifest weight of evidence, testimony and documentation presented to this Court. (Rule 1.530)

2. Record of this cause contains substantial competent evidence pertaining to misrepresentations of the Plaintiff in reference to his assets, earnings and financial status. (Rule 1.530)

3. The award of property and monies to the Defendant based upon the alleged income and assets of the Plaintiff and written agreement pertaining thereto for joint ownership of the said assets, was in error and devoid of competent evidence to sustain the Court's ruling pertaining thereto, and contrary to the manifest weight of evidence presented. (Rule 1.530)

4. That the Defendant has newly discovered evidence to substantiate that the Plaintiff misrepresented his financial worth, income, direct or indirect control of various stock, and further, the Plaintiff misrepresented his control, direct and indirect of a Florida corporation, known as Allstate Tile & Supply, Inc.

That further, said newly discovered evidence could not have been discovered by due diligence prior to said trial due to the fact that said misrepresentation by the Plaintiff occurred at time of trial. (Rule 1.540(b))

5. That the Court erred in entering an Order pertaining to custody of the children based upon an alleged New York Order pertaining thereto, which was not verified or substantiated in accordance with legal procedure pertaining thereto, and that further the Court in paragraph six (6) of said final judgment extended the rights and duties of the parties pertaining to said minor children, notwithstanding that the Court ruled in paragraph five (5) of said Order that the Court did not have jurisdiction over said children. (Rule 1.530)

6. That the Court erred in its ruling under paragraph eight (8) of said judgment in that said paragraph, in particular sub-paragraphs (b) and (c) unquestionably

violate the Defendant's freedom of speech and movement which is guaranteed by the Florida Constitution and United States Constitution, and amendments pertaining thereto. (Rule 1.530)

7. That this Court erred in ruling of paragraph nine (9) of said judgment which directed the Defendant to terminate all pending litigation pertaining to assets of the Plaintiff, in that this Court does not have jurisdiction to order cessation of litigation previously initiated in the State of New York. (Rule 1.530)

WHEREFORE, the Defendant moves that this Court schedule a hearing wherein additional testimony and evidence shall be presented pertaining to the allegations set forth hereinabove and thereupon grant to the Defendant a new trial and/or new hearing.

(Notarization and certification omitted)

JUDITH HERSKOWITZ

[TITLE OMITTED]

ORDER ON MOTION FOR NEW TRIAL

THIS CAUSE coming on to be heard on Defendant, Judith Herskowitz' Motion for New Trial and Petition for Re-Hearing, and after reviewing the documents submitted in support of the Defendant's Motion for New Trial, hearing argument of counsel, and being further advised in the premises, it is hereby

ORDERED AND ADJUDGED as follows:

1. That the Defendant's Motion for New Trial is hereby and the same granted on the issue of the Defendant, Judith Herskowitz' special equitable and legal interest in the assets of the Plaintiff, Bernard J. Herskowitz.

2. That while the Defendant and the parties' children are within the jurisdiction of the Family or Superior Court of New York, said Court shall have concurrent jurisdiction as to matters concerning support and alimony.

3. That assessment of costs and attorney's fees are reserved upon filing of appropriate motions by either party.

4. That Defendant, Judith Herskowitz, will terminate litigation in the New York Court against the Plaintiff, Bernard J. Herskowitz, concerning assets which are the subject of the litigation in this cause.

5. That Plaintiff, Bernard J. Herskowitz, is hereby enjoined from conveying any real or personal property which he has a legal or equitable interest in, whether in his possession or a third person's, to any other person until further order of this Court.

DONE AND ORDERED, In Chambers, at Miami, Dade County, Florida, this 7 day of September, 1971.

Jack A. Falk

CIRCUIT JUDGE

[TITLE OMITTED]

FINAL JUDGMENT UPON RE-HEARING

In this matter, the Husband, BERNARD J. HERSKOWITZ, filed a Complaint for Divorce on May 5, 1970. After final hearing, the Court entered a Final Judgment of Divorce on May 19, 1971, recorded May 21, 1971, in Minute Book 1229 at Page 209 of the Public Records of Dade County, Florida. Therein, the Court did not adjudicate matters pertaining to custody of the minor children of the parties, since they were not in Florida and moreover were residents of the state of New York. However, the Court granted full faith and credit to the orders of the Family Court of New York as pertain to custody and visitation; and, upon stipulation of the parties, adopted the Family Court of New York's determination as to alimony and child support—the same being $50.00 a week alimony and $50.00 a week per child in child support for a total of $150.00 per week. What the Court did adjudicate, thoroughly, completely, and fully, were the financial relationships between the parties hereto as pertain to the Wife's property rights in the Husband's assets, at all times between the inception of the marriage and the date of that Judgment. This Court ruled in the aforesaid Final Judgment:

> The Court finds from all of the testimony and voluminous exhibits proferred that the Defendant has a special equity in the assets of the Plaintiff in the amount of $26,500.00, which is hereby ordered to be paid by the Plaintiff to the Defendant in equal annual payments over a five (5) year period commencing thirty (30) days

> from date of this Order. All the financial matters of the parties from the inception of the marriage to date have been reviewed and this special equity award is a final determination. The alleged contract between the parties dated August 15, 1956, formed one of the bases for this award and all pending litigation concerning same shall be dismissed.

A Motion for New Trial and Petition for Re-Hearing was then filed by the Defendant, JUDITH HERSKOWITZ. She asserted that the judgment of this Court was in error and that she had "newly discovered evidence" as to the extent and valuation of the Husband's assets, as they existed from the inception of the marriage to the present time. On September 7, 1971, this Court entered its Order granting the Motion for a New Trial on the sole

> issue of the Defendant, Judith Herskowitz's special, equitable and legal interest in the assets of the Plaintiff, Bernard J. Herskowitz.

The Court further ordered that:

> Defendant, Judith Herskowitz, will terminate litigation in the New York Court against the Plaintiff, Bernard J. Herskowitz, concerning assets which are the subject of the litigation in this cause.

Prior to the Final Re-Hearing on the foregoing issue, this Court entered orders permitting the Defendant, JUDITH HERSKOWITZ, to issue subpoenas for the taking of depositions

of all persons or corporations outside the jurisdiction of this Court, who have knowledge concerning facts which are in issue in this cause, including, but not limited to, the following persons and corporations:

Richloom Fabrics, Inc.
Delta Service, Inc.
Delta Draperies, Inc.
Richloom Upholstery, Inc.
Romar Mills, Inc.
Romar Weaving, Inc.
Marnay Sales & Manufacturing, Inc.
Weis, Voisin & Co., Inc.

Utilizing the aforesaid Order, the Defendant, JUDITH HERSKOWITZ, applied, in the Supreme Court in and for the County of Bronx, for an order to take the depositions upon oral questions of all of the aforesaid persons, and others who might have testimony and evidence relevant to the issues before this Court. The Supreme Court of New York entered an Order permitting such depositions to be held on February 17, 1972. Subsequent orders of this Court expanded the number of persons whose depositions could be taken. The issue or issues pertaining to which these depositions were taken involved not only the assets of BERNARD J. HERSKOWITZ, but the assets of BERNARD J. HERSKOWITZ "in his name individually or jointly with others, in the names of third parties, or in the names of the herein named respondents." (From the Affidavit of Judith Herskowitz as filed in the Supreme Court of the State of New York, County of Bronx, on or about March 28, 1972)

The Defendant accurately stated the issues before this Court. The cause came on for hearing in this Court beginning May 23, 1972. At issue were all of the assets owned by BERNARD J. HERSKOWITZ in his own name or in the name of any other person or persons from the inception of the marriage to the date of the hearing. The Court took extensive testimony on all the financial dealings of the Husband, BERNARD J. HERSKOWITZ, from the inception of the marriage to the date of the hearing. The testimony reflected on the financial dealings between BERNARD HERSKOWITZ and his brother, Marvin, and his father, Joseph. The Court took testimony relative to the existence and validity of the post-nuptial agreement between the parties; the Court further took testimony on the Wife's special equity in the assets of the Husband because of or apart from the existence and validity of the said post-nuptial agreement. The Court traced all the financial transactions of the Defendant from the inception of the marriage to the date of the hearing. These included, without limitation, a number of major financial transactions such as:

(a) A series of loans during and after the marriage and the collateral and all the shares of stock that secured these loans, whether in the name of BERNARD J. HERSKOWITZ or his brother, Marvin Herskowitz, or his father, Joseph Herskowitz. The Wife asserted that the collateral all belonged to BERNARD J. HERSKOWITZ, and she claimed a one-half interest in all the collateral for these loans;

(b) The purchase by the Defendant of the assets of Freetex Weaving Corporation, and its subsequent sale for sums in excess of $110,000.00 The Wife claimed a one-

half interest both in the Husbands' assets in Romar Mills (the name in which the Freetex assets were purchased) and all the proceeds of the sale therefrom and all assets traceable thereto.

(c) The purchase by the Defendant of certain real estate interests in New Jersey through lawyers and real estate brokers known to him involving not less than three separate transactions. The Wife claimed an undivided one-half interest in all of those assets.

(d) The purchase by BERNARD J. HERSKOWITZ of shares of stock in three Florida corporations, to wit, Allstate Tile and Supply Company, Inc., Allstate Tile and Supply Company of Orlando, Inc., and ATS Industries, Inc. The Wife claimed one-half interest therein.

(e) The Wife further claimed an interest in the assets of the father, Joseph Herskowitz, and brother, Marvin Herskowitz (of the Plaintiff), maintaining that they held assets for BERNARD HERSKOWITZ, and she claimed an interest in their assets, including but not limited to the stocks of brother, Marvin, and father, Joseph, as also in the sum of $27,000.00 (approximately) paid over to the father, Joseph, by Weis, Voisin, and Cannon, Stock Brokers, in 1971.

(f) Moreover, there was testimony reflecting upon the assets of B. J. H. Sales, a stock brokerage account of Joseph Herskowitz, at various stock brokers, and many other assets of the Plaintiff, his father, and his brother. The Wife claimed an undivided one-half interest in all of the foregoing.

JUDITH HERSKOWITZ introduced into evidence, either without objection or over objection, all of the depositions and the exhibits attached thereto, that were taken by her pursuant to prior orders of this Court (the Court having overruled all of the Defendant's objections to the notice of the day, time, and place of the taking of depositions). The Court considered all of the testimony and the evidence, including all of the exhibits, both in the Petition for Re-Hearing and in the former trial that preceded the re-hearing.

WHEREUPON AND BY REASON OF THE FOREGOING, the Court being fully advised in the premises, it is upon consideration ordered:

(1) The Court finds from all of the testimony and voluminous exhibits in evidence that the Defendant, based on special equities, and the aforesaid post-nuptial agreement, has an equity in the assets and the accumulated earnings, wages and profits of the Plaintiff in the amount of $46,500.00, which is hereby ordered to be paid by the Plaintiff to the Defendant as follows:

(a) Ten thousand dollars within thirty (30) days from the date hereof, and

(b) The balance in three (3) equal installments beginning thirteen (13) months from and after the date hereof.

(2) The Defendant, JUDITH HERSKOWITZ, be and she is hereby required to dismiss all litigation pending against the Plaintiff pertaining to his assets and all causes

of action arising therefrom, including assessment of damages for alleged concealment thereof now pending against him.

(3) The Plaintiff be and he is hereby required to pay as fees to the Defendant's counsel the sum of $5,000.00 within 30 days of the date hereof.

(4) Assessment and taxation of costs shall be reserved pending further hearing thereon following notice.

(5) All of the other and remaining provisions of the Final Judgment of Divorce heretofore entered in the within cause on May 19, 1971 (save and except Paragraphs 9 and 10 thereof) be and the same are hereby ratified, approved and confirmed.

(6) The Court retains jurisdiction over the parties hereto to enforce each and every provision of this Final Judgment.

(7) All the financial matters between the parties and pertaining to their property interests, from the inception of the marriage to the date of this Judgment have been reviewed and this special equity award is a final determination. In reaching this determination the Court took into consideration not only the post-nuptial agreement between the parties, but also any special equitable interests the Wife may have in the assets of the Husband; moreover, the Court took into consideration all of the Defendant's claims of concealment and secreting of assets by the Plaintiff in the names of his father, Joseph Herskowitz, and his

brother, Marvin Herskowitz. It is the intention of this Court to fully and finally lay at rest the litigation between these parties as pertains to their assets from the date of the inception of the marriage to and including the present time.

DONE AND ORDERED in chambers at Miami, Florida, this 12 day of June, 1972.

Jack A. Falk

CIRCUIT JUDGE

[TITLE OMITTED]

MOTION FOR RE-HEARING

COMES NOW Defendant, Judith Herskowitz, by and through her undersigned counsel, and files her Motion for Re-Hearing in this cause, and for grounds, states:

1. The Final Judgment is contrary to the law.

2. The Final Judgment is contrary to the evidence.

3. The Final Judgment is contrary to the law and the evidence.

4. The Court erred in failing to provide Defendant with the proper procedure and relief as required by the Uniform Partnership Law or Statute of New York or Florida law, based upon the contract between the parties.

5. The Court erred in alleging that the Agreement dated August 15, 1956, which is erroneously referred to as a post nuptial agreement, which, in effect is a business contract independent of the marriage, formed one of the basis of this Final Judgment.

6. The Court erred in requiring the Defendant, Judith Herskowitz, to dismiss all litigation pending against Plaintiff, Bernard J. Herskowitz, pertaining to his assets and all causes of action arising therefrom, including assessment of damages for alleged concealment thereof now pending against him in the State of New York, inasmuch as this Court did not award any relief based on such contract, and the Final Judgment failed to set forth the values of the Plaintiff's assets upon which the special equity was awarded.

7. The Court erred in its ruling under Paragraph Eight (8) of said Final Judgment in that said Paragraph, in particular, sub-paragraphs (b) and (c) unquestionably violate Defendant's freedom of speech and movement which is guaranteed by the Florida Constitution and United States Constitution, and amendments pertaining thereto. (Rule 1.530).

WHEREFORE, Defendant prays for a re-hearing of this cause to correct the errors of the Court as aforestated.

WE HEREBY CERTIFY that a true copy of the foregoing Motion for Re-Hearing was mailed to Tobias

Simon, Esquire, attorney for Plaintiff, 1492 South Miami Avenue, Miami, Florida, this 22nd day of June, 1972.

LAW OFFICES OF
RONALD L. DAVIS, Esq. P.A.
and
JUDITH HERSKOWITZ,
Defendant, In Persona,
as Co-Counsel
417 Biscayne Building
19 W. Flagler Street
Miami, Florida 33130
(379-2851)

By: _____
Ronald L. Davis

[TITLE OMITTED]

AMENDMENT TO MOTION FOR RE-HEARING

Defendant, appearing as co-counsel, for her Amendment to Motion for Re-Hearing states:

1. That Plaintiff Bernard J. Herskowitz shall be required to post a bond on the special equity award of $46,500.

2. Paragraph 3 of the Final Judgment entered May 19, 1972, shall be amended to state that the divorce was granted to Plaintiff uncontested by Defendant.

3. That the award of counsel fees to Norman Haft in the sum of $3,500 for the divorce proceedings and which the court ordered to be paid from the special equity award of Defendant Judith Herskowitz should be payable by Plaintiff.

4. That those portions of the Final Judgment Upon Re-Hearing should be stricken that concern issues that are not within the jurisdiction of this Court, that are contrary to the record on file and that are contrary to the matters that were before this Court upon Re-Hearing.

JUDY HERSKOWITZ
Appearing as co-counsel

BY: JUDITH HERSKOWITZ

[TITLE OMITTED]

ORDER DENYING PETITION FOR RE-HEARING

THIS MATTER came before the Court on the defendant's Petition for Re-Hearing. The Court having heard argument of counsel and being advised in the premises, it is hereby Ordered as follows:

1. The Petition for Re-Hearing is hereby denied.

DONE AND ORDERED at Miami, Florida, this 27th day of October, 1972.

Jack A. Falk
CIRCUIT JUDGE

(Mailing Certificate Omitted)

App. 20

[TITLE OMITTED]

ASSIGNMENT OF ERRORS

The Defendant, JUDITH EVA HERSKOWITZ, hereby assigns the following errors to be relied upon by her in her Appeal to the District Court of Appeals, Third District of Florida.

1. The Court erred in its Final Judgment Upon Rehearing:

(a) In attempting to adjudicate matters of contract rights not included in the pleadings.

(b) In purporting to litigate a contract agreement which had been entered into in the State of New York, and which was currently being litigated in the Supreme Court of the State of New York in an action between the parties which had been instituted prior to the Plaintiff's commencement of the instant divorce proceedings.

(c) In failing to apply the applicable New York Law to a contract entered into between the parties in the State of New York, and in attempting to apply Florida law of special equities to a New York contract.

(d) In ordering the Defendant to dismiss all litigation pending against the Plaintiff pertaining to his assets and all causes of action arising therefrom, including assessment of damages for alleged concealment thereof, which litigation included pending litigation properly within the jurisdiction of the New York Courts, which litigation (1) had been commenced prior to the inception of the instant

divorce action; (2) which litigation involved other parties in addition to the Plaintiff and Defendant; (3) which litigation consisted of three distinct causes of action, none of which were a part of the instant action.

2. The Court erred in its Final Judgment Upon Rehearing:

(a) In failing to make findings identifying the assets, and the value of the assets, which were determined to be subject to the contract between the parties under which it is expressly provided that "each of the said parties is and shall be the owner in one-half of the other's assets, incomes, profits, wages, earnings, investments and properties."

(b) In failing to require the Plaintiff to produce evidence as to the Plaintiff's assets to the date of the hearing, although the Court recognized that "at issue were all of the assets owned by BERNARD J. HERSKOWITZ in his own name or in the name of any other person or persons from the inception of the marriage to the date of the hearing."

(c) In declaring that its special equity award was the final determination of all financial matters between the parties and pertaining to their marriage from inception of their marriage to the date of its judgment, and further erred in declaring that all such matters had been reviewed "to the date of this judgment."

(d) In finding, contrary to the law and the evidence, that the Defendant has "an equity in the assets and the accumulated earnings, wages and profits of the Plaintiff

in the amount of $46,500.00" . . . "based on special equities and the aforesaid post-nuptial agreement"; and in failing to specify how much of its award was based on special equities and how much was based on the said agreement.

(e) In that, while recognizing in the Final Judgment Upon Rehearing that the Wife claimed a one-half interest in various stocks, real estate holdings and other assets in a number of major financial transactions of the Plaintiff and an interest in additional assets held in the name of the father and brother of the Plaintiff, the Court failed to specifically adjudicate these claims, and failed to make any finding as to whether such assets were or are assets of the Plaintiff, and failed to determine the value of said assets.

3. The Court erred in its Final Judgment Upon Rehearing of June 12, 1972:

(a) In declaring that it had, in its Final Judgment of May 19, 1971, adjudicated "thoroughly, completely, and fully . . . the financial relationships between the parties hereto as pertain to the Wife's property rights in the Husband's assets, at all times between the inception of the marriage and the date of the Judgment", although in its Final Judgment it awarded a special equity of only $26,500.00, whereas in its Final Judgment Upon Rehearing it awarded $46,500.00.

(b) In entering an arbitrary compromise-type determination of special equity, unrelated to proof of the Husband's current assets and the Wife's contractual rights therein.

4. The Court erred in its Final Judgment Upon Rehearing:

(a) In providing that the special equity award of $46.500.00 shall be paid in various installments, rather than in a single payment.

(b) In ordering that the said payments of $46,500.00 should be paid "(a) $10,000.00 within thirty (30) days from the date hereof; and (b) the balance in three (3) equal installments beginning thirteen (13) months from and after the date hereof", without stating in what intervals the said three equal installments must be paid.

(c) In failing to expressly declare that the Wife's special equities should be taken from the Husband's one-half interest in said assets.

5. The Court erred in its Final Judgment Upon Rehearing:

(a) In failing to award the Defendant interest payments in connection with the monetary award against the Plaintiff.

(b) In failing to require the Plaintiff to post a bond to assure the payment of the $46,500.00 of special equity.

6. The Court erred:

(a) In failing to require the Plaintiff to comply with the Defendant's motion for production of records relative to the Plaintiff's assets and their valuation.

(b) In directing, on or about June 2, 1972, that the Defendant leave the Judge's Chambers while counsel for the Plaintiff and for Defendant conferred with the Court relative to the proceedings and determined substantive rights of the Defendant.

(c) In denying the Defendant's motion for clarification of the Court's Order Upon Rehearing.

7. The Court erred in its Final Judgment Upon Rehearing, in that:

(a) Although it expressly declared that the Court "did not adjudicate matters pertaining to custody of the minor children of the parties, since they were not in Florida and moreover were residents of the State of New York", the Court made specific rulings with regard to visitation and other aspects of the said children.

(b) The Court ratified, approved and confirmed that provision of the Final Judgment of Divorce, entered by it on May 19, 1971, which adjudged that the Defendant is guilty of Extreme Cruelty, but failed to state that the Defendant had not contested the allegations of the Complaint concerning the grounds for divorce.

(c) The Court permitted Plaintiff's counsel to prepare the Final Judgment Upon Rehearing, which materially mis-states the facts relative to the Court's proceedings and the evidence presented to the Court, and which by ambiguity distorts the basic issues presented and decided by the said Court.

7. The Court, in its Order of May 11, 1972, prejudicially denied the Defendant's motion for postponement of the hearing scheduled for May 23, 1972, which motion was predicated upon the need for additional time in which to obtain the production of records and depositions previously requested and critically required by the Defendant to prove the assets of the Plaintiff.

8. The Court erred in denying the Motion and Amended Motion for Rehearing.

(Certification Omitted)

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT
JULY TERM, A.D. 1973

CASE NO. 72-1396

JUDITH EVA HERSKOWITZ,

Appellant,

vs.

BERNARD J. HERSKOWITZ,

Appellee.

Opinion filed August 21, 1973.

An appeal from the Circuit Court for Dade County, Jack A. Falk, Judge.

David Bolton, for appellant.

Tobias Simon and Elizabeth duFresne, for appellee.

Before PEARSON, CHARLES CARROLL and HAVERFIELD, JJ.

PER CURIAM.

The appellant is the former wife of the appellee. She appeals a final judgment of divorce by presenting and arguing some twenty-one points on appeal. We affirm upon a holding that all of the matters presented fall within two categories; they are either procedural errors which

were induced by the appellant's own actions or they relate to findings which are supported by evidence before the trial judge and are within the range of his judicial discretion. For obvious reasons we will not attempt to discuss each point separately. However, we will briefly state the origin of the problems involved and the basic principles supporting the trial judge's disposition of the issues presented.

The parties were married in New York in 1956. A few months after the marriage, the husband and wife entered into a contract by which the wife conveyed her interest in a business to her husband and herself as joint owners, and the parties agreed that all their assets would be jointly owned from that day on. The husband and the business prospered but the marriage did not. After the business in which the parties owned a joint interest was sold in 1965, and after the appellee husband began to variously invest the monies he received, the Family Court of the State of New York entered an order in 1966 providing for the support of the appellant and her two minor children. The record indicates that the appellee made a conscious effort to conceal his assets from his wife. In 1967, the appellant wife began litigation in the Supreme Court, County of Bronx, New York, seeking an accounting and other relief against the appellee, his father and two brothers. She sought enforcement of her rights of joint ownership as set out in the contract of 1956.

The appellee husband brought the instant action for divorce in 1970. The appellant answered, filed a counterclaim, and attached the 1956 agreement. After extensive testimony and hearings a final judgment was entered on May 19, 1971. This judgment awarded the appellant the

amount of $26,500.00 as "a special equity in the assets of the Plaintiff". The court ordered the amount paid "in equal annual payments over a five (5) year period commencing (30) days from [the] date of this Order". The appellant filed her motion for new trial and petition for rehearing. In the petition, she urged that the court had not properly considered the income and assets of the plaintiff and the written agreement pertaining thereto for joint ownership of assets[1]. The trial judge granted appellant's motion for new trial on September 7, 1971, on the sole issue "of the Defendant, Judith Herskowitz' special equitable and legal interest in the assets of the Plaintiff, Bernard J. Herskowitz". Prior to the final rehearing, the court entered orders permitting the appellant to take extensive depositions. Thereafter, the court entered its final judgment on rehearing. This judgment reaffirmed the prior judgment except as to provisions regarding appellant's interest in her husband's assets. As to these assets, the court found:

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[1] * * *

"3. The award of property and monies to the Defendant based upon the alleged income and assets of the Plaintiff and written agreement pertaining thereto for joint ownership of the said assets, was in error and devoid of competent evidence to sustain the Court's ruling pertaining thereto, and contrary to the manifest weight of evidence presented. (Rule 1.530)

"4. That the Defendant has newly discovered evidence to substantiate that the Plaintiff misrepresented his financial worth, income, direct or indirect control of various stock, and further, the Plaintiff misrepresented his control, direct and indirect of a Florida corporation, known as Allstate Tile & Supply, Inc.

"That further, said newly discovered evidence could not have been discovered by due diligence prior to said trial due to the fact that said misrepresentations by the Plaintiff, occurred at time of trial. (Rule 1.540[b])"

* * *

"(1) The Court finds from all of the testimony and voluminous exhibits in evidence that the Defendant, based on special equities, and the aforesaid post-nuptial agreement, has an equity in the assets and the accumulated earnings, wages and profits of the Plaintiff in the amount of $46,500.00, which is hereby ordered to be paid by the Plaintiff to the Defendant as follows:

(a) Ten thousand dollars within thirty (30) days from the date hereof, and

(b) The balance in three (3) equal installments beginning thirteen (13) months from and after the date hereof."

* * *

In addition, the court made the following order relative to other litigation pending between the parties:

* * *

"(2) The Defendant, JUDITH HERSKOWITZ, be and she is hereby required to dismiss all litigation pending against the Plaintiff pertaining to his assets and all causes of action arising therefrom, including assessment of damages for alleged concealment thereof now pending against him."

* * *

On this appeal, one of appellant's principal contentions is that the court had no jurisdiction to determine the rights of the parties to the contract made between the parties in 1965. We think that this position is untenable in view of the fact that the appellant herself introduced

the contract into the litigation and petitioned for and received an extensive rehearing based upon the application of that contract to the assets of the appellee. The court did not err in pursuing the matter at the appellant's request inasmuch as it is well established that upon a termination of marriage by a divorce or dissolution, the trial judge should insofar as possible settle all outstanding property rights between the parties. See Finston v. Finston, 160 Fla. 935, 37 So.2d 423 (1948); Dotter v. Dotter, Fla.App. 1962, 147 So.2d 209.

Appellant's contention that the court erred in enjoining her from further prosecution of additional court proceedings to enforce the same rights which she has litigated in this cause is without legal basis. In order to insure the efficacy of judgments in dissolution of marriage cases, the courts have frequently wielded their power of injunction. See cases collected at 10A Fla. Jur. Dissolution of Marriage, Separation, and Annulment, §167, et seq. The power may be used to prevent harassment after final judgment. See Bazzano v. Bazzano, Fla.App. 1965, 175 So.2d 801. Therefore, the order is proper under the circumstances of this case.

The appellant has also urged reversal of the finding concerning the extent of appellant's interest in the appellee's property. An examination of the lengthy record convinces us that the finding is based upon conflicting evidence and that we may not substitute our view for that of the trial judge. See Hobbs v. Hobbs, Fla.App. 1962, 136 So.2d 363.

Appellant has pointed out that the trial court's order directing the payment of the sum of $46,500.00 in three

equal installments fails to specify at what intervals of time these installments must be paid. In view of the fact that the trial court reaffirmed the provisions of its prior judgment except as changed in the final judgment upon rehearing, we conclude that the provision objected to should be amended by providing that the sum of $46,500.00 is to be paid as follows: (a) $10,000.00 immediately upon remand of this cause; and, (b) the balance in three equal installments, the first installment to be paid on or before the 12th day of July, 1974, a like installment to be paid on or before the 12th day of July, 1975, and a like installment to be paid on or before the 12th day of July, 1976.

We have considered the other points raised on appeal and find that they do not present reversible error.

The judgment appealed is amended as to the installment payments as above set out and as amended is affirmed.

Affirmed.

IN THE DISTRICT COURT OF APPEAL OF FLORIDA THIRD DISTRICT.

CASE NO. 72-1396

JUDITH EVA HERSKOWITZ

Appellant

vs

BERNARD J. HERSKOWITZ

Appellee

SUGGESTION TO HAVE QUESTION CERTIFIED TO THE SUPREME COURT OF FLORIDA AS ONE OF GREAT PUBLIC INTEREST.

Appellant, JUDITH EVA HERSKOWITZ, by her undersigned attorney, and pursuant to the Constitution of the State of Florida Art. 5 Sec. 4(2), and Florida Appellate Rule 4.6, suggests that this Court certify the following question involved in this cause to the Supreme Court of Florida, as a question of great public interest, and says:

1. The following question is involved in this cause and was passed on by this Court: In adjudicating the property rights of the parties in an action for dissolution of marriage, may the trial court bar one of the parties from enforcing the terms of a contract between the parties calling for joint ownership of all assets, and over objection make a consolidated "special equity" award which indistinguishably merges therein both special equities and contract rights?

This question is of great public interest for the following reasons:

(a) At issue is the right of the trial court in a dissolution of marriage case to modify or materially alter or refuse to enforce, the terms of a valid contract entered into between a Husband and Wife.

(b) This decision will affect the enforceability of all contracts between Husband and Wife.

(c) At issue also is the basic constitutional question of whether in a dissolution of marriage case, non-enforcement of contract rights of a party constitutes a deprivation of property without due process of law, in violation of Article 1 Sec. 9 of the Florida Constitution 1968 Revision, and of the 14th Amendment to the United States Constitution. (Also see Art. 1, Sec. 10).

(d) Also, inherently at issue is the question of whether the Court's merging of contract rights into special equities deprives a party of property without due process of law, since it changes the remedy and permits the Court to order installment payments of the special equity and thereby deprives a party of the valuable right to have a judgment which can be immediately executed.

WHEREFORE, Appellant moves this Honorable Court to enter its order certifying the foregoing question to the Supreme Court of Florida as being a question involving great public interest.

(Certification Omitted)